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Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

Although supporting the result arrived at by the Fourth Circuit, respondent has abandoned, and to some degree repudiated, the central reasoning of the court of appeals below.

The Fourth Circuit insisted that the general prohibition against discrimination contained in section 703 of Title VII does not apply to any discriminatory acts by an employer occurring after the end of the employment relationship.[1] Relying on that premise, the court of appeals argued that Congress intended the scope of sections 703 and 704(a) to be co-extensive. (Pet. App. A-14 to A-15). Respondent, on the other hand, concedes — as it must in light of *Hishon v. King & Spalding*, 467 U.S. 69 (1984) — that section 703 indeed applies to former employees, and thus insists, contrary to the court below, that Congress did not intend section 704(a) to protect all the persons entitled to file charges under section 703. Respondent's Brief ("R. Br.") 34-36).[2]

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[1]Pet. App. A-14 (the Title VII definition of "unlawful employment practice" "comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated") (emphasis in original); *id.* at A-15 ("Title VII does not redress discriminatory practices, however reprehensible, which occur after the employment relationship has ended").

[2]R. Br. 9 ("There are legitimate reasons for offering more protection against discrimination than retaliation").

Although respondent contends that Congress intended section 704(a) to be narrower than the substantive prohibitions of section 703, it is clear on the face of the statute that section 704(a) is broader in at least two respects. First, although section 703, in conjunction with section 706, provides a remedy only to persons who have filed timely and meritorious charges, section 704(a) provides remedies to all persons retaliated against for filing charges, regardless of whether those charges

The Fourth Circuit relied heavily on the definition of "employee" contained in section 701(f) of Title VII. We noted in our opening brief the inherent ambiguity in that statutory definition, stemming from the two different meanings of the word "employed" (P. Br. 17-19). In this Court, respondent disdains any analysis of the definition contained in section 701(f), asserting instead that "an employer knows who 'his employees' are" (R. Br. 24). Respondent does not of course suggest that section 701(f) defines "employee" as "the people whom employers call their employees." Rather, respondent grounds its argument, not on the statutory definition, but on what it asserts is vernacular usage among employers.[3]

I. The Statutory Language

At this point there appear to be two areas of agreement between the parties. First, both parties concur that the term "employee" is at times utilized to refer to former as well as current employees; respondent calls this the "generic sense" of the term. *Compare* R. Br. 17-19 *with* P. Br. 8-13. Second, the parties agree that the correct interpretation of the word "employee" in section 704(a) turns at least in part on the manner in which that term is employed in Title VII. *Compare* R. Br. 9 ("'Employee' must be understood within the context of Title VII") *with* P. Br. 13 *et seq.*

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ultimately failed either on the merits or on some procedural ground. Second, although section 703 provides remedies only for persons who are themselves victims of employment discrimination on the basis of race, color, religion, gender or national origin, section 704(a) protects persons who never themselves suffered such discrimination, but who were penalized for having opposed discrimination against others.

[3]Contrary to respondent's description of common usage, a company might well refer to one of its retirees as a "long time Widget Company employee."

Respondent insists that the term "employee" in section 704(a) must refer only to current employees because Title VII *always* uses "employee" in this narrower sense alone. "Title VII consistently uses 'employee' to refer to current employees" (R.Br. 9).[4]

In our opening brief we noted that in nine different instances Title VII uses the word "employee" in a context which clearly includes former employees (P. Br. 14). With regard to the remedial provisions of sections 706(g)(1) and 717, respondent asserts that the term "employee" means "'employee' at the time of the adverse employment action; i.e. discharge" (R. Br. 22). But a person who was an employee "at the time of the adverse employment action" is not a "current" employee but a former employee, albeit a particular kind of former employee.[5] When section 717(b) requires "that an employee . . . be notified of any [administrative] action taken on any complaint," and section 717(c) authorizes the filing of a civil action by an "employee" "[w]ithin 90 days of receipt of notice of final [agency] action" the statute is clearly referring, not to events that will occur at "the time of the adverse employment action" but at a point in time well after that adverse action has occurred — and after the plaintiff in a discharge case will have ceased to be a current employee.

Three provisions of Title VII refer to "employees" of the EEOC (see P. Br. 14-15). Respondent does not deny

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[4]See R. Br. 21 ("'Employee' is not used differently in other sections of Title VII"), 24 ("identical words used in different parts of the same act are intended to have the same meaning.")

[5]Respondent's reformulation is also insufficient to make sense of section 717; if "employee" meant only an individual employed at the time of the adverse action, section 717 would not apply, for example, if agency officials decided to terminate pensions for all African-American retirees, or to refuse to provide job references for laid-off female workers.

that these provisions apply to former EEOC workers, but simply asserts that

> they have nothing whatever to do with the prohibitions on employers not to discriminate against individuals or to retaliate against "his employees."

(R. Br. 22). While the subject matter of these three provisions is not the relationship between private employers and their former employees, the use of "employee" in these sections to encompass former EEOC workers manifestly is relevant to, and refutes, respondent's assertion that "employee" is "consistently" used in Title VII to refer solely to current employees.

In our opening brief we noted that in six instances Title VII uses the term "employee" where Congress must have meant to include, or have been referring exclusively to, future employees (P. Br. 15-16). Respondent's somewhat cryptic response to these provisions reads as follows:

> Such sophistic reasoning cannot be taken seriously. If "employee" includes individuals to be hired for future employment, then why does § 704(a) specifically protect "applicants for employment?"

(R. Br. 23.) Respondent appears to contend that "employee" never includes future employees (R. Br. 23). If that were the case, however, the six sections discussed in our opening brief would be nonsensical; the BFOQ clause, for example, would apply only to job applicants who were already employed elsewhere, but not to out-of-work applicants. The answer to the question posed by respondent is readily apparent: even though "employee" is used in Title VII to refer to future employees, section 704(a) included a reference to applicants to assure that its protections would apply to retaliation against *unsuccessful* applicants, *e.g.*, to an

employer which refused to hire someone because of his or her participation in protected activities.[6]

Respondent suggests that if Congress had intended section 704(a) to protect former employees, it would have utilized the term "individual" rather than "employee" in that provision. (R. Br. 15) But use of the term "individual" would have expanded the scope of section 704(a) far beyond former employees; redrafted in that way, the section would have applied to the entire population of the United States.[7] Although the section 703(a) prohibition regarding discrimination by employers uses the term "individual," it does so in a way that could encompass only current or

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[6]Respondent appears to assume that the "applicant" clause of section 704(a) refers to and protects only individuals who were current applicants at the time of the retaliation. But Title VII frequently uses the term "applicant" to refer to an individual who was actively seeking employment at some point in the past. See, *e.g.*, sections 717(b) ("applicants" to receive notice of final agency action), 717(c) ("applicants" can bring civil action). If the term "applicant" in section 704(a) indeed protects from retaliation individuals who were applicants prior to, but not at the time of, the retaliatory act, exclusion of former employees would be particularly strange, since an individual who had never worked for the employer in question would enjoy greater protection than one who had.

[7]The anti-retaliation provision of the Americans With Disabilities Act of 1990 is deliberately framed to cover any "individual," 42 U.S.C. § 12203, even absent any employment connection between the retaliator and the victim, because most of the substantive rights created by the ADA deal with non-employment matters. *E.g.*, 42 U.S.C. §§ 12141-65 (access to public transportation), 42 U.S.C. §§ 12181-89 (access to public accommodations).

The anti-retaliation provision of the Family and Medical Leave Act refers to retaliation against any "individual," 29 U.S.C. § 2615, but the civil cause of action created by the FMLA is limited to claims by "eligible employees." 29 U.S.C. § 2617(a)(1).

former employees or applicants.[8] Similarly, Congress could not, as respondent suggests, have reached former employees simply by deleting the possessive "his" before "employees" (R. Br. 19); that change would have encompassed every employee of every employer in the United States, but would not — on respondent's view — have applied to former employees, like petitioner, who were out of work at the time of the retaliatory act.

Of course, Congress could have addressed this issue more specifically. The drafters could have more clearly indicated a desire to include former employees within the scope of section 704(a) by using the very words "former employee" in the text of the statute, or they could have used the phrase "current employee" rather than "employee" to exclude former employees unequivocally. The mere fact that either meaning might have been, but was not, set forth expressly does not prove that the contrary meaning was intended. Although Congress clearly intended that other provisions of Title VII apply to current and/or future and/or former employees, the framers of that legislation never used the words "current," "former," or "future," but left the

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[8]Section 703(a)(1), for example, makes it an unlawful employment practice to "fail or refuse to *hire* or to *discharge* any individual or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*, because of such individual's race . . ." (emphasis added). The only "individual" to whom this section could apply would be a job applicant or current or former employee.

Although the anti-retaliation provisions in section 704(a) regarding employment agencies and joint apprenticeship committees refer to "individuals," that is because "individuals" is the term used in section 703 to denote the persons protected from discrimination. These substantive and anti-retaliation provisions do not use the term "employee" because the persons against whom an employment agency or joint apprenticeship committee might discriminate are not ordinarily their employees.

appropriate meaning of "employee" to be divined from the particular context in which that word was utilized.[9]

The fact that Congress expressly forbade employer retaliation against "applicants" is not inconsistent with construing "employee" to include former employees. Although "employee" is used throughout Title VII to refer to past or future as well as current employees, Congress often included the term "applicant" in other sections when it wished to make clear that job seekers were to be protected. It is scarcely to be believed that Congress, by adding the term "applicants" to section 704(a) to assure that job seekers would be protected against retaliation, intended also covertly to narrow dramatically the scope of section 704(a) by excluding former employees. On the contrary, the express inclusion of applicants would make no sense if Congress intended to exclude former employees from the scope of section 704(a), because the inclusion in the provision of applicants would permit a former employee seeking work elsewhere to obtain the protections of section 704(a) by the simple step of also filing a job application with his former employer, thus becoming an "applicant."

To be sure, as respondent notes, Congress has at times made express reference to former employees in other statutes (R. Br. 15-16). But respondent does not deny that at times Congress has also used the term "employee" in

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[9]Respondent attaches significance to the fact that Congress did not amend section 704(a) in 1991 when it amended Title VII, despite the fact that two other statutes enacted in the early 1990s referred expressly to former employees (R. Br. 15). But at the time when Congress adopted the 1991 amendments to Title VII, all the appellate decisions to have reached the issue had held that section 704(a) did apply to former employees. The first decision clearly to the contrary, *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 (1993), did not occur until July 1992, some eight months after the adoption of the 1991 amendments.

other statutes to refer to former employees (R. Br. 16-19). "Employee" is a relatively elastic term which this Court, and Congress, have understandably used in a variety of ways. The term "employee" appears in more than 5100 sections in the United States Code.[10] It would be quite impossible for Congress to review all those statutes whenever it used the term in new legislation; it would be astounding if Congress could use such a general term in thousands of statutes without considerable variation in context, intent and meaning. The meaning of the term "employee" in a particular provision must be gleaned, not from the divergent ways in which the word is used in other laws, but from the context and purpose of the specific statute in question.

We noted in our opening brief that the authoritative interpretations of section 704(a) in the legislative history of Title VII repeatedly refer to its protections as extended to "persons" (P. Br. 34). Respondent argues, "This is broader language than Congress chose in the final version of the statute" (R. Br. 33). Respondent evidently misapprehends what occurred during the enactment of Title VII. At the time when the Clark-Case Memorandum described the precursor of section 704(a) as protecting "persons," the relevant language of that section was precisely the same as "the final version of the statute" — "employee."[11]

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[10]A LEXIS search of the USCODE file for "text(employee)" identifies 5167 sections. The term is used in sections of all but three of the fifty titles of the United States Code.

[11]The anti-retaliation provision of the bill summarized by the Memorandum forbade retaliation by an employer "against any of his employees or applicants for employment." See 110 Cong. Rec. 7213 (Clark-Case Memorandum); *id.* at 8203 (reprinting § 705(a) of bill during subsequent debate that occurred prior to voting upon any proposed amendments to the bill).

Respondent does not argue that Congress wanted to leave former employees without federal protection from retaliation. But, respondent asserts, Congress chose to protect such individuals only from retaliation by new prospective employers, against whom they had never filed charges or testified, while permitting retaliation by the former employer against whom those charges or testimony was directed. Respondent offers no explanation as to why Congress would have chosen to place outside the prohibitions of § 704(a) the employer most likely to want to retaliate against the charging party, and the only employer who would benefit if coercive retaliation forced a former employee to withdraw a charge.

A recent Seventh Circuit decision regarding the scope of section 704(a) provides an additional text-based reason to construe the statute to apply to former employees. *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996). As that opinion noted, section 704(a) prohibits retaliation inflicted because the victim "'opposed *any practice* made an unlawful employment practice by this subchapter'" or "'participated in *any* manner in an investigation, proceeding or hearing under this subchapter.'" *Id.* at 890 (emphasis added in part). In many of the most common types of employment discrimination, however, the individual affected would *not* be a current employee of the employer in question at the time he or she filed a charge or took part in a subsequent investigation or proceeding. If section 704(a) protected only current employees, that section — far from applying to "any" violation or "any" proceeding — would not apply to almost all charges of hiring discrimination, discriminatory dismissals, or discrimination in pensions or other post-employment benefits.

II. The Availability of State Remedies

Respondent advances two contradictory arguments regarding state laws[12] bearing on relations between employers and former employees. At pp. 25-30 of its brief, respondent contends that it is of no consequence whether section 704(a) applies to former employees because comparable protections for former employees are already provided by state law; on this view, application of section 704(a) would be unnecessary and duplicative. At pp. 37-39 of its brief, on the other hand, respondent argues that section 704 should not be applied to former employees because state law remedies for those workers are far narrower than section 704, and that applying section 704 would thus in some sense interfere with state law.[13] Obviously *both* of these arguments cannot be correct; we submit that neither is.

State defamation law, on which respondent principally relies (R. Br. 29), is in many respects inadequate to advance the prophylactic purposes of section 704. Defamation law would not forbid a variety of extremely effective retaliatory practices, such as (a) refusing to provide any references at all for charging parties, (b) refusing to include in references about charging parties any positive

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[12]The National Labor Relations Act does not, as respondent suggests, contain a general prohibition against blacklisting. Rather, that law forbids an employer only from refusing to hire an individual "to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

[13]Respondent may be asserting that, in those instances (*e.g.*, retaliation against a current employee) in which section 704(a) concededly does apply, its protections are excessive and "absurd," because state laws — although permitting forms of retaliation forbidden by section 704(a) — already provide "adequate" protection. Such a contention would be simply a disagreement with the decision of Congress to enact section 704(a) in the first place.

information, (c) placing in references regarding charging parties types of adverse or personal information that would not be included in references for any other former employees,[14] (d) including in a reference a truthful (albeit retaliation-based) statement that the former employer would not rehire, or recommend, the former employee. State defamation law cannot be fairly read to endorse, or protect, such abuses; these are simply problems that defamation law does not undertake to address. In any event, Title VII clearly does forbid an employer, regardless of state law, from taking such adverse actions on the basis of race or gender when providing recommendations regarding former or current employees, or from taking such actions, for retaliatory reasons, regarding recommendations concerning current employees. There is no reason to treat any differently retaliation-based adverse actions directed at former employees.

Any state law remedies that might apply to some types of retaliation would necessarily vary from one jurisdiction to another. Respondent argues, for example, that the caselaw-based "qualified privilege" for references could immunize an employer from being sued for a retaliatory adverse reference (R. Br. 38), while one amicus supporting respondent insists, to the contrary, that a retaliatory motive would eviscerate any such privilege.[15]

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[14]Where an employer's normal practice is to provide only laudatory information, or no information at all, about former employees, Title VII forbids an employer to single out former employees on the basis of race, or in retaliation for having filed a Title VII charge, and as to them alone dispense harmful — albeit accurate — information. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (Title VII forbids employer to impose greater sanction on transgressing employee on account of his race).

[15]Brief *Amicus Curiae* of Washington Legal Foundation, at 15 n.7.

The scope of any such privilege might well turn on differences in state laws. Respondent also notes that eleven states have adopted special statues limiting defamation actions based on employer references; the terms of these statutes differ considerably,[16] and numerous other states do not have such laws.[17] It is difficult, moreover, to see how the existence of these state laws — the earliest of which was enacted in 1986 -- could control the interpretation of a federal civil rights law adopted several decades earlier.

While there might well be some instances in which retaliation forbidden by section 704 would also violate state law, this crazy-quilt of state statutes and caselaw is entirely inadequate to protect the viability of the Title VII charge process. At best the viability of that process would vary from state to state, a result flatly inconsistent with the need for a uniform national enforcement scheme. *See Patterson*

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[16]The California statute, for example, is limited to references provided with regard to applicants for law enforcement positions. CAL. GOV'T CODE § 1031.1 (West 1993). The Oklahoma law applies only to references provided with the employee's consent. OKLA. STAT. ANN. tit. 40, § 61 (West 1995). Several of these provisions are expressly inapplicable if the reference violated civil rights laws. ALASKA STAT. § 09.65.160 (1993); TENN. CODE ANN. § 50-1-105 (1995). Most but not all statutes deny immunity where the employer acted in bad faith or with a malicious purpose. ALASKA STAT. § 09.65.160 (1993); FLA. STAT. § 768.095 (1991); ME. REV. STAT. ANN. tit. 26, § 598 (West 1995); N.M. STAT. ANN. § 50-12-1 (Michie 1995); TENN. CODE ANN. § 50-1-105 (1995). Maryland recently enacted a law immunizing employers unless they act with actual malice or intentionally or recklessly disclose false information. 1996 Md. Laws 469 (May 14, 1996; effective October 1, 1996).

[17]Maryland law regarding interference with contracts would have no application in a case such as this, since it applies only where a contractual relationship has been created between the former employee and the new employer. *Bagwell v. Peninsula Regional Medical Center*, 665 A.2d 297, 313 (Md. App. 1995).

v. McLean Credit Union, 491 U.S. 164, 183 (1989). Frequently a former employee — even with the aid of skilled counsel — could not reliably glean from state law whether it would be safe to file an EEOC charge or to talk to an EEOC investigator. Ordinary charging parties, who are untutored in the law, and who do not enjoy the luxury of a personal attorney on retainer to give advice about issues such as state defamation law, could not know with any assurance whether it was prudent to file a complaint with, or give information to, the EEOC.

Even where substantive state law did forbid a particular retaliatory act, that would ordinarily be insufficient as a practical matter to safeguard the Title VII process. The value of section 704(a) to a current or former employee lies not only in its substantive scope, but also in the availability of the informal and inexpensive Title VII enforcement machinery to implement section 704(a) itself. A charging party who is the victim of retaliation forbidden by section 704(a) can seek legal protection merely by submitting a single-page handwritten charge to the nearest EEOC office; the EEOC is then responsible for investigating and seeking to resolve the problem, and the Commission can bring a civil action in its own name to end the abuse. In contrast, a charging party forced to rely on state law must retain a private attorney to bring a state civil action — a course of action far beyond the means of most charging parties, especially those who are out of work.[18] Any state law remedies would of course be unavailable to the EEOC itself; if former employees, in response to actual or threatened retaliation, refused to file charges, or to cooperate in EEOC

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[18]The remedies available in a state defamation action would often be inferior to the remedies provided by Title VII. Neither injunctions nor awards of counsel fees, two key elements of the relief authorized by section 706, are ordinarily available in a defamation action.

investigations, the Commission could not file suit to stop that retaliation, but would be relegated to pleading with the justifiably frightened former workers to hire private counsel and bring their own lawsuits against the employers at issue.

Respondent correctly observes that section 704(a), if it applied to retaliatory references intended to punish former employees, would forbid many practices that are not prohibited by state defamation law. Such differences, respondent asserts, would "conflict" with state law and lead to "absurd" results. Worse yet, applying section 704(a) to retaliatory references, respondent urges, would disturb the "balance" which the states have seen fit to draw between enforcing Title VII and protecting employees "against groundless claims of retaliation" (R. Br. 40). Respondent warns that "[d]isgruntled former employees could sue former employers over employment references even if . . . the employer has complied with state law" (R. Br. 10). But the proper "balance between employee and employer rights [is] struck by Title VII" itself. *Patterson v. McLean Credit Union*, 491 U.S. at 182 n.4. Section 704(a) clearly does permit a former employee to bring such suits — regardless of state law — if retaliatory references were issued before he or she was fired, or if an adverse reference was motivated by race or gender. As to actions brought by these former employees, Congress has clearly chosen to strike the balance in favor of safeguarding the Title VII administrative process. Respondent offers no reason why Congress, having done so with regard to workers retaliated against while still employed, would have left to the states the role of determining the degree of protection, if any, to be accorded to workers retaliated against after they were dismissed.

The ultimate answer to respondent's argument based on state law is found in Title VII itself. Section 708 provides that any state law that "purports to require or permit the doing of any act which would be an unlawful

employment practice under this title" is superceded. Thus, even if state law would permit an employer to issue a retaliatory letter of reference, Congress has already provided that such a law will not shield the employer from liability under Title VII.

III. The Workability of Applying Section 704 to Former Employees

Respondent suggests that it would be impracticable "to fashion equitable relief for a former employee" (R. Br. 31-32) But Title VII unquestionably does require courts to fashion remedies for former employees in a variety of circumstances. If, for example, an employer wrote a retaliatory adverse reference letter just *before* discharging an employee, that action would unquestionably be unlawful; respondent does not deny that courts could and would provide equitable and monetary relief in such a case, even though, by the time the court acted, the victim of the retaliation would have become a former employee. Thus here the remedy for the allegedly retaliatory reference letter of March 2, 1992 would be essentially the same as the remedy that would have been provided had the same letter been written on October 12, 1991, the day before petitioner was dismissed. Similarly, if respondent had sent an adverse post-dismissal reference letter because of petitioner's race, that would of course have been illegal, and petitioner would have been entitled to equitable and legal relief. Where a plaintiff has been injured by a retaliatory or race-based reference letter, the fashioning of relief is not made harder, or affected at all, by whether the victim was a current or former employee at the time the letter was written, or by whether the unlawful motive was retaliation or discrimination on the basis of race.

The remedial problems hypothesized by respondent are insubstantial.[19] Title VII does not contain a general prohibition against providing adverse information — truthful or otherwise — to a prospective employer. What Title VII does require is that an employer not make on certain prohibited bases — *e.g.*, race, gender, or the filing of a charge with EEOC — its decision whether to make adverse statements in a reference letter. Where an employer has acted with an impermissible motive, a court can and should forbid future violations of the law, and direct such corrective measures as are necessary to place the victim in the position which he or she would have occupied but for that violation of federal law. *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 762-70 (1976). Congress entrusted the framing of particular injunctive decrees to the sound discretion of district judges. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-20 (1975).[20]

Respondent expresses concern that, if former employees were protected from retaliation, baseless retaliation claims might be filed regarding reference letters written decades after a worker had left the employ of a

[19]Respondent also expresses concern about what types of retaliatory actions by an employer against a former employee would be actionable (R. Br. 29 n.37, 32). But this affords no reason to deny protection to former employees; the kinds of retaliatory actions forbidden against former employees are the same kinds of actions which section 704(a) forbids against current employees.

[20]Standard provisions in settlements of Title VII discriminatory discharge cases deal with letters of references or responses to other inquiries from prospective employees. A neutral text is often agreed upon, discharges are changed to resignations, all telephonic inquiries are routed to a designated person, etc.

particular firm (R. Br. 32-33).[21] Actual experience, however, demonstrates that this does not occur; in the reported cases, as in the instant case, disputes regarding allegedly retaliatory reference letters typically arise within a matter of months after the plaintiff ceased working for the employer in question.[22] In any event, any problems posed by post-employment retaliation claims are not different in principle from other post-employment claims. Title VII indisputably provides protections against other practices that could occur long after a plaintiff has stopped working for an employer. Title VII would clearly be violated if, for example, an employer decided in 1996 to slash pension benefits for Roman Catholics who had retired in 1966. If respondent

[21]Respondent insists that the district judge's rejection of the merits of petitioner's dismissal claim demonstrates that petitioner's retaliation claim is baseless. Specifically, respondent argues that the trial judge who heard that dismissal claim necessarily found that all the adverse information in respondent's March 2, 1992, reference letter was "true" (R. Br. 6, 30, 39). There is, however, no decision by the district court regarding the contents of the letter. Indeed, there were neither an opinion nor any findings of fact following the trial of petitioner's discharge claim. Rather, the district judge after a bench trial merely entered a one sentence order stating that "judgment is entered in favor of Defendant, Shell Oil Company." *Robinson v. Shell Oil Co.*, Case No. JFM 93-20 (D. Md. April 15, 1994) (Judgment).

The mere fact that respondent prevailed at the trial of the discharge claim does not mean that the trier of fact accepted all, or even any, of respondent's proffered explanations for dismissing petitioner. If the trier of fact had concluded that the reasons proffered by the employer were fabrications — and that the adverse reference letter was a tissue of lies — the court was certainly authorized on that basis to find that petitioner's dismissal was racially motivated, but it was not required to do so. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

[22]*E.g.*, *Bailey v. USX Corp.*, 850 F. 2d 1506 (11th Cir. 1988) (employment ended August 29, 1984; adverse reference provided in April, 1985); *Polsby v. Chase*, *supra* note 9 (employment terminated July 9, 1985; adverse reference written on December 24, 1985).

were to adopt a policy of refusing to provide references for female former employees, a woman who had not worked for Shell since 1970 — but could not obtain a needed job reference in 1996 — clearly would be entitled to relief.

As a practical matter, however, any disputes about references from an employer of ten or twenty years earlier are exceedingly unlikely. Prospective employers are ordinarily interested in an applicant's record in positions held within the previous few years; former employers often will no longer have records regarding employees who left decades earlier. In the rare case in which a prospective employer sought, received and relied on adverse information regarding a job held by an applicant many years in the past, the applicant would be hard pressed to convince a trier of fact that the former employer still held a grudge after all the intervening years.

In our opening brief we suggested that the Fourth Circuit's interpretation of section 704(a) would permit employers to sabotage resort to the Title VII administrative process by victims of discrimination (P. Br. 23-30). Respondent maintains, however, that the critical purpose of the Title VII enforcement scheme is to "quickly resolve employment disputes" (R. Br. 32). Noting that section 706(e)(1) establishes a limitations period of 180-300 days, respondent reasons that the policy of avoiding protracted disputes would be advanced, *a fortiori*, if aggrieved individuals — in this case former employees subjected to retaliation — were precluded completely from seeking redress under Title VII for their injuries. In a somewhat Orwellian turn of phrase, respondent describes this proposed scheme — under which the number of days within which certain retaliation charges would have be filed is set at

zero[23] — as a "'statute of repose'" (R. Br. 33).

The central purpose of Title VII, however, was not to eliminate or shorten disputes between employers and employees, but to eradicate discrimination. There were many decades, to be sure, when the national and state governments resolutely protected employers from discrimination litigation by openly tolerating, if not encouraging, racist employment practices. At least since 1964, however, the federal government has chosen a different course, making the elimination of invidious discrimination "a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Conclusion

Respondent suggests that limiting the protections of section 704(a) to current employees (and current applicants) would create only a minor and relatively unimportant limitation on the scope of that provision. In reality, such a limitation would go a long way toward eviscerating section 704(a), and with it the protections essential to the viability of the Title VII enforcement scheme.

Under the interpretation of section 704(a) advanced by respondent, that provision would not protect from employer retaliation victims of discriminatory dismissals (since they would be former employees by the time they filed Title VII charges), former applicants for employment who filed charges of discrimination in hiring (unless they had reapplied at the time of the retaliatory act), or victims of discrimination against former employees (e.g. pension discrimination). Former employee witnesses being questioned by EEOC — witnesses who might ordinarily be

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[23]In the instant case petitioner filed his Title VII charge eight days after the allegedly retaliatory letter.

more willing than current employees to provide candid information — could be openly threatened by employers under investigation by EEOC.

These categories of persons to be excluded from the protections of section 704 represent a substantial portion of all Title VII complainants. Many of the Title VII cases that have been considered by this Court involved claims of discrimination in dismissals, hiring or pensions. We set forth in the Appendix to this brief a list of 22 such decisions of this Court. In many sexual harassment cases plaintiffs only file charges with EEOC *after* they have stopped working for the employer at issue; Teresa Harris[24] and Mechelle Vinson[25] had both become former employees — and on respondent's view were thus subject to whatever forms of retaliation their former employers could devise — by the time they filed their Title VII charges.

For the above reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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[24] *Harris v. Forklift Sys., Inc.*, 410 U.S. ___, 114 S. Ct. 367 (1993). Harris resigned on October 1, 1987, as a result of the harassment, *id.* at 369, and filed her Title VII charge on October 10, see Joint Appendix at 10-11, *id.*

[25] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Vinson took indefinite sick leave in September, 1978, *id.* at 60, and in November of that year finally resigned and filed a charge with EEOC, see *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980).

APPENDIX

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St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)(discharge claim).

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)(discharge claim); see 857 F. 2d 1014(5th Cir. 1988)(charge filed "after" dismissal).

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990)(hiring claim).

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988)(discharge claim).

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987)(discharge claim).

Anderson v. City of Bessemer City, 470 U.S. 564 (1985)(hiring claim).

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)(discharge claim).

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)(hiring claim).

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)(discharge and failure to rehire claim).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)(discharge claim).

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979)(hiring claims and discharge claims).

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978)(hiring claim).

Dothard v. Rawlinson, 433 U.S. 321 (1977)(hiring claim).

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)(discharge claim).

International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)(discharge claim).

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)(discrimination in retiree benefits).

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)(discharge claim)

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)(discharge claim)(pending charge amended to add discharge claim following petitioner's dismissal).

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(discharge claim)(petitioner fired September 29, 1969; charge filed October 27, 1969).

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)(hiring claim).

McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973)(hiring claim).

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)(hiring claim).